Supreme Court, U.S.
FILED

95 1252 DEC 21 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States.

October Term, 1995

ROBERT E. MATES

Petitioner

v.

The OCCUPATIONAL SAFETY and HEALTH ADMINISTRATION, GILMARTIN, MATTHEW A., REGIONAL SUPERVISOR INVESTIGATOR, JOHANNES, ARTHUR M., ACTING SUPERVISOR, REIDY, GERALD P., JR., REGIONAL ADMINISTRATOR, MILES, JOHN B., JR., DIRECTOR OF FIELD OPERATIONS, SALEM, GEORGE R., SOLICITOR OF LABOR, ZINMAN, SETH D., SOLICITOR for LEGISLATION AND LEGAL COUNSEL, PENDERGRASS, JOHN A., former ASSISTANT SECRETARY, TYSON, PATRICK R., former ACTING ASSISTANT SECRETARY.

Respondents

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Robert E. Mates, Pro se
342 Windsor Road
Englewood, N.J. 07631
(201) 569-3852

February 6, 1996

QUESTIONS PRESENTED FOR REVIEW

ISSUE I-

1- On May 4, 1993, the District Court for the District of New Jersey, issued a Judgement Order for D.C. Case No. 92-3977. This decision was in favor of the respondents. The United States Court of Appeals for the Third Circuit issued an opposing Judgement order, in favor of the petitioner, on September 29, 1994 and its Mandate of November 8, 1994, C.A. No. 93-5508. After this time, on November 15, 1994, the case was remanded to the District Court for further proceedings. For this same case, on March 28, 1995, the District Court Judge reissued the same May 4, 1993 Judgement Order. Then, on September 19, 1995, a second, Third Circuit panel of Judges, adjudged this same case in favor of the respondents. Judgement Order of September 19, 1995 and its Mandate of October 24, 1995, C.A. No. 95-5247.

a- Can two Judgements and their Mandates stand in opposition to one another in the same Circuit of a U.S. Court of Appeals?

b- Can the second panel issue a reversal of the September 29, 1994, Judgement Order on September 19, 1995, without first revoking the prior September 29, 1994, Judgement Order and its Mandate?

2- On, Smith-Bey v. Cripe, 852 F.2d 592 (1988), the District of Columbia Circuit.

On September 29, 1994, the Third Circuit panel ruled that Judge Politan's court abused its discretion, in regard to Smith-Bey then, when given the same conditions a second time, how can the second panel on September 19, 1995, ignore Smith-Bey when the Smith-Bey ruling is still there, in Rule 4(j) and Rule 4(m)?

QUESTIONS PRESENTED FOR REVIEW- (Continued)

3- Both, Rule 4(j) and Rule 4(m), stipulate that the petitioner may suffer a dismissal from the court for failure to effect service during the 120 days statute of limitation time period:

a- The nine respondents did not answer the summons for 122 days after the delivery date and **136** days after September 23, 1992, the summons starting date as set by the court. For this full time frame, not once did their counsel raise the issue of improper service. For the court to enforce the **120** day period on the petitioner would it not also, be correct that the court should enforce the **120** day period on the respondents under the standard of **equal protection** of the law, in that a different treatment be not so disparate. Did this then, simply make them out-of-time?

b- On February 8, 1993, the respondents had allowed the **120** day time frame to pass before indicating their dissatisfaction with Rule 4(e), as the method of service the court clerk had set on September 22, 1992, together with the chosen method for the summons delivery. Was it correct law for the district court Judge to invoke Rule 4(j), in their stead on May 4, 1993 and then, only after the expiration of the **120** day time frame of Rule 4(j)?

c- Since the Third Circuit panel rendered their verdict in favor of the petitioner on September 29, 1994, and ordered the district court to **VACATE** its ruling of May 4, 1993, would not the first **120** day ruling be nullified?

d- If so, then is only **55** days of litigation, November 15, 1994 to January 9, 1995, sufficient to allow Rule 4(j) to be raised the second time?

QUESTIONS PRESENTED FOR REVIEW- (Continued)

ISSUE II-

1- On the District Court's Judgement Order of January 25, 1993 in which Hon. Judge Nicholas H. Politan dismissed the complaint against the Occupational Safety and Health Administration ("OSHA"). He chose the year of 1987 as my accrual date and then ruled that I had only two years time from then to commence litigation.

After the Third Circuit's September 29, 1994 Judgement Order for C.A. No. 93-5508, was remanded to the District Court I filed a Motion and accompanying Brief on December 16, 1994, under Fed. R. Civ. P.60(b)(2). I submitted new evidence to prove that there has been continued tort activities against me by the respondent, Mr. Matthew A. Gilmartin, Supervisory Investigator, Region II, 11(c)/405 Programs, up to and including the year of 1993.

QUESTION:

a- If, a Judgement Order is rendered by a district court early on and later, after further proceedings, a litigant presents newly discovered evidence to the court under Fed. Rule 60(b)(2), which could alter the earlier Judgement, is the Judge not then, duty bound to revisit the prior Judgement Order?

b- The first panel on September 29, 1994, reviewed the district court's denial of a Rule 60(b)(2) motion as an abuse of discretion citing, Lorenzo v. Griffith, 12 F. 3d 23, 26 (3d Cir. 1993). **Appendix D (Pet. App. 19a, II)**. With this ruling, was the second panel on September 19, 1995, correct to not form their determination in a like manner when Rule 60(b)(2) was raised the second time?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW, ISSUE I . . i

(QUESTIONS) ISSUE II iii

TABLE OF AUTHORITIES v

APPENDIX: Judgement Orders, ISSUE I vii

APPENDIX: Judgement Orders, ISSUE II viii

EXHIBITS IN SUPPORT OF BRIEF viii

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS . 4

STATEMENT OF THE CASE, ISSUE: I 5

STATEMENT OF THE CASE, ISSUE: II 13

REASONS FOR GRANTING THE WRIT. 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES	Page
Cartolano v. Tyrrel, 421 F.Supp. 526 (N.D. Ill. 1976)	19
Hilmon Co. (V.I.) Inc. v. Hyatt International, 899 F.2d 250, 252 (3d Cir. 1990)	8
Judgement Order, 9/29/94 and Mandate, 11/08/94	10
Lovelace v. Acme Markets, Inc., 820 F.2d 81, 83 (3d Cir.), cert. denied 484 U.S. 965 (1987)	8
Moye v. U.S., E.D.N.C., 1990, 735 F.Supp. 179	17
Ortiz v. Clarence H. Hacket, Inc., 581 F. Supp. 1258, (n.d. Ind., 1984, p. 1261	11
Smith-Bey v. Cripe, 852 F.2d 592 (1988).	10/11/18
United States v. Sams, 521 F.2d 421, 429 (3rd Cir. 1975)	17
Vance v. U.S., 126 F.R.D. 14 (E.D.N.Y. 1989)	8/9
COURT RULES	
C.J.S., Federal Courts, () 301 (36) p. 1381	3/10
Rule 4(e)	1
Rule 4(j)	1/2/3/5
Rule 4(m)	2

Rule 12(a) 5

TABLE OF AUTHORITIES-(Continued)

COURT RULES **Page**

Rule 60(b) 2/18

Rules of Civil Procedure Process Rule 4 1

STATUTES

Tort Claims Procedure, 28 § 2674, Note 51, ...14/17

OSHA Instruction ADM 12-7, 2A CH-1, March 14, 1988 Office of Management Systems and Organization, ... 15

EXHIBITS

APPENDIX: JUDGEMENT ORDERS.

ISSUE I-

Appendix A (Pet. App 1-2)--- **U.S. Court of Appeals** for the Third Circuit, Petition for Rehearing Denied, October 16, 1995, C.A. No.95-5247, 2 pages.

Appendix B (Pet. App. 3-4)--- **U.S. Court of Appeals** for the Third Circuit's Judgement Order of September 19, 1995, affirming the District Court's Judgement Order of March 28, 1995, C.A. No. 95-5247, 3 pages.

Appendix C (Pet. App. 5)--------- **District Court's** Judgement Order for the 9 respondents, March 28, 1995, 1 page.

Appendix C (Pet. App. 6-15)--- **District Court's** Letter Opinion for the 9 respondents, March 28, 1995, 11 pages.

Appendix D (Pet. App. 16-21) --- **U.S. Court of Appeals** for the Third Circuit's Judgement Order of September 29, 1994, to vacate the District Court's Judgement Order of May 4, 1993, C.A. No. 93- 5508, 7 pages.

Appendix E (Pet. App. 22-23)--- **District Court's** Judgement Order for the 9 respondents, August 5, 1993, rejecting Motion for appeal of May 4, 1993, 2 pages.

Appendix F (Pet. App. 24-29)---- **District Court's** Judgement Order for the respondents, May 4, 1993, 7 pages.

APPENDIX: JUDGEMENT ORDERS - Continued.

ISSUE II-

Appendix G, (Pet. App. 30-32)----- **District Court's** Judgement Order for the Occupational Safety and Health Administration, April 21, 1993, 3 pages. For the

Appendix H (Pet. App. 33-41)-- **District Court's** Transcript of Proceedings, January 25, 1993, 11 pages.
For Judgement Opinion of the **U.S. Court of Appeals for the Third Circuit** See Appendix D (Pet. App. 17-18).

Appendix I (Pet. App. 42-43)----- **District Court's** Judgement Order for the Occupational Safety and Health Administration, January 27, 1993, 1 page.

EXHIBITS IN SUPPORT OF BRIEF.

U.S.D.C. SUMMONS IN A CIVIL ACTION (Pet. App. 45-46) Case No: 92-3977, Sept. 22, 1992- An example, one out of ten.

No._____

In The

Supreme Court of the United States

October Term, 1995

♦

ROBERT E. MATES

Petitioner,

v.

The OCCUPATIONAL SAFETY and HEALTH ADMINISTRATION, GILMARTIN, MATTHEW A., REGIONAL SUPERVISOR INVESTIGATOR, JOHANNES, ARTHUR M., ACTING SUPERVISOR, REIDY, GERALD P., JR., REGIONAL ADMINISTRATOR, MILES, JOHN B., JR., DIRECTOR OF FIELD OPERATIONS, SALEM, GEORGE R., SOLICITOR OF LABOR, ZINMAN, SETH D., SOLICITOR for LEGISLATION AND LEGAL COUNSEL, PENDERGRASS, JOHN A., former ASSISTANT SECRETARY, TYSON, PATRICK R., former ACTING ASSISTANT SECRETARY.

Respondents.

♦

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

♦

PETITION FOR WRIT OF CERTIORARI

♦

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Third Circuit entered in this case on September 19, 1995.

OPINIONS BELOW

ISSUE I- Only.

The Order and Judgement of the Third Circuit Court of Appeals, No. 95-5247, filed September 19, 1995, is unpublished and is set forth in Appendix B (Pet. App. 3a-4a). The Order and Judgement of Dismissal by the United States District Court for the District of New Jersey, for the nine respondents dated, March 28, 1995, is unpublished; and is set forth in Appendix C (Pet. App. 5a) and Appendix C (Pet. App. 6a-15a).

ALSO FOR ISSUE I and ISSUE II-

The Order and Judgement of the Third Circuit Court of Appeals, No. 93-5508, filed September 29, 1994, for the Occupational Safety and Health Administration and the nine respondents is unpublished; and is set forth in Appendix D (Pet. App. 16a-21a). The Orders and Judgement for denial by the United States District Court for the District of New Jersey, dated May 4, 1993 and August 5, 1993, respectively, are unpublished: and are set forth in Appendix F (Pet. App. 24a-29a) and Appendix E (Pet. App. 22a-23a).

ISSUE II- Only.

The Order and Judgement of the Third Circuit Court of Appeals, No. 93-5508, filed September 29, 1994, for the Occupational Safety and Health Administration and the nine respondents is unpublished; and is set forth in Appendix D (Pet. App. 16a-21a). The Orders and Judgement for denial by the United States District Court for the District of New Jersey as to OSHA only, dated January 27, 1993 and Transcript of Proceedings dated, January 25, 1993, respectively, are unpublished; and are set forth in Appendix I (Pet. App. 42a-43a) and Appendix H (Pet. App. 33a-41a). A timely Motion was filed by petitioner for reconsideration under the Federal Rules of Civil Procedure as a Rule 60(b) motion which was denied in the District Court in an Order entered on April 23, 1993 and is set forth

in Appendix G (Pet. App. 30a-32a). On September 29, 1994, for case No. 93-5508, the Third Circuit adjudged this to be incorrect and criticized the District Court for abuse of its discretion, Appendix D (Pet. App. 16a-21a).

JURISDICTION

Pursuant to booklet titled, RULES of the Supreme Court of the United States, Adopted July 26, 1995, Effective October 2, 1995, Part III, Jurisdiction on Writ of Certiorari, Supreme Court Rule 10 (a), the United States Court of Appeals for the Third Circuit has entered two conflicting decisions for this District Court Case No. 92-3977. These decisions are dated September 29, 1994, Case No. 93-5508 and September 19, 1995, Case No. 95-5247 respectively; they are set forth in Appendix D (Pet. App. 16a-21a) and Appendix B (Pet. App. 3a-4a).

Also, pursuant to Supreme Court Rule 10 (c), the District Court made its first decision, filed on May 4, 1993, and its second decision, filed on March 28, 1995 and both were based on the Court's application of Federal Rules of Civil Procedure, Rule 4(j). The Third Circuit case No. 93-5508 had ruled that Rule 4(j) was not applicable for the District Court Case No. 92-3977 and remanded the case to the District Court for further proceedings. The District Court disregarded the decision and Mandate of the Third Circuit and reissued the same Rule 4(j) decision as before and this was dated, March 28, 1995.

This form of action does not comply with the judgement system as it relates to the lower and higher court's authority. As I understand it, on remand from the higher court, it is the duty of the District Court to promptly comply with the Mandate of the Court of Appeals and obey the directions therein. C.J.S., Federal Courts, () 301 (36) p. 1381.

This Court has jurisdiction to review the Judgement of the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1254 and Sup. Ct. R. 10.1(a) and 10.1(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 4. Process

(j) Summons: Time limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party upon motion."

The Fourteenth Amendment to the United States Constitution provides that:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

ISSUE I.-Application of Rule 4(i), Federal Rules of Civil Procedure.

It is my opinion that there are **four** major areas where this D.C. case No. 92-3977, may have been adjudged incorrectly.

First- Ms. Aurora A. Bell, Deputy Clerk, of the District Court of New Jersey issued all of the summonses on September 22, 1992, in the name of each defendant and to be delivered to:

> **"c/o Mr. Michael Chertoff, United States Attorney, 970 Broad Street, Newark, N. J."**

According to the court, this was in accordance with Rule 4(e), Fed. R. Civ. P. and the respondents were ordered by the court to answer within **60** days after delivery. See Exhibit 2 , Pet. App. 45a-46a.

As stated under **Rule 12(a)**:

> **"A defendant shall serve an answer within 20 days after the service of the summons and complaint upon the defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state."**

On the basis of her choice of Rule 4(e) as the means of service I was to use, the Deputy Clerk allowed **60** days for the defendants to answer the complaint and summons. Its a wonder to me how Judge Politan can be constantly insisting that I made a mistake in not effecting service under his chosen rule when his own district court had made the court's choice on September 22, 1992. As an experienced Judge he should have known that Rule 4(e) was used, when the **60** day time frame was set by the Deputy Clerk of the District Court, for the defendants to reply by rather than the **20** day time frame, as required under Rule 12(a). Also, it was made quite plain to him with the Judgement Order of the Third Circuit on September 29, 1994. Obviously, Rule 4(e) did not fit his plan although it had been chosen by three Circuit Judges and his own Deputy Clerk.

On October 6, 1992, I complied with the Court's service requirement by having all summonses delivered to the office of Mr. Chertoff, as so stated on the summonses, by Mr. James Casey, from the Sheriff's office of Essex County and they were accepted by Ms. Jenny Powell, at the U.S. Attorney's office. This was only **15** days after the initial September 21, 1992 filing date. Through prompt service, I had allowed the respondents sufficient time, over and well beyond the court's allotted **60** days, to answer the service.

After the **60** day time limit had elapsed, I patiently waited to January 25, 1993, this was **124** days after the September 21, 1992, filing date and should have automatically affirmed the service of process. If granted a time extension from October 6, 1992, the date the summonses were delivered, the U.S. Attorney and or the defendants still would have had **11** days more to answer the summons before the **120** day time frame had expired. They could have argued the point that their **120** day statute of limitations time period began from the date of service, October 6, 1992 and this argument probably would have prevailed. However, in this instant case, what has

prevailed is the fact that the U.S. Attorney and the respondents, by not answering the complaint for over the required **120** days evidenced their disregard for the rule. Their inaction to the court order of the summons clearly indicates that they were trying to evade the service. The U.S. Attorney wanted Judge Politan to issue the same Judgement Order for the respondents as he had done for OSHA.

They could have filed an instant motion to protect any arguable time which may have remained. Instead, after I filed the default motion on January 25, 1993, neither the respondents nor the U.S. Attorney paid any heed to the **120** day time frame. The U.S. Attorney then waited an additional **14** days before he answered for the respondents in their official and unofficial capacities, on February 8, 1993. This was after **136** days had elapsed from the summons date. There was no previous attempt by any of them or the U.S. Attorney to return the summonses or to file a motion in opposition to the courts assigned method of delivery. Not once during the **120** day time frame did they raise the claim of improper service. Also, there was no word from Judge Politan to indicate that he had found fault with Rule 4(e), as the method the Court Clerk had assigned to this case. On October 6, 1993, they all took the summonses in good part and held them for **136** days from the filing date of September 21, 1992, as it were a tacit agreement to the preceding act. By receiving the summonses, with no complaint for over **122** days, proper service was

evidenced by this sufficient act. When the United States' trained Attorney, Mr. Andrew O. Schiff, Esq., waited over **120** days to inform me of his objection to the Deputy Clerk's chosen method of the summons delivery, it is my opinion that he had allowed the nine respondents to be out-of-time. In fact, when taken from the summons date of September 22, 1992, the U.S. Attorney was **76** days in default. He should have been aware of the rule and filed a timely complaint.

By not communicating with me or the court within the **120** day time frame, the U.S. Attorney has contributed to the respondent's continuing efforts to intentionally evade service. Instead of castigating me under a partial section of Rule 4(j), Judge Politan should have ruled the U. S. Attorney to be too late with his complaint of defective service. An unbiased judge would have done so. See: Hilmon Co. (V.I.) Inc. v. Hyatt International, 899 F.2d 250, 252 (3d Cir. 1990). The Hilmon court noted that "the legislative history provides only one example where an extension for good cause would be permissible, specifically where the defendant intentionally evades service." By first accepting delivery on October 6, 1992, with no complaint filed in opposition or other means of communication with me, this only evidenced the plaintiff's continuing efforts to evade service. Also, See: Lovelace v. Acme Markets, Inc., 820 F.2d 81, 83 (3d Cir.), cert. denied, 484 U.S. 965 (1987).

On May 4, 1993 and again on March 28, 1995, Judge Politan used Rule 4(j), with the **120** day time frame against me and the U.S. Attorney said nothing to the contrary. True justice should have it that, the trained U.S. Attorney must have answered within the prescribed time frame after he received the complaint for the respondents. If the law holds the petitioner responsible to remain within the **120** day time frame it must, **in an equal manner,** hold the respondent responsible. In Vance v. U.S., the Chief Justice wrote:

"It is unconscionable on the part of the Government to seek to dismiss this action claims since 1983 and has had full notice of this action in this District having actually received a copy of the summons and complaint on September 19, 1988."

Also, I found it to be difficult to understand why Judge Politan could not accept Rule 4(e), when the Deputy Clerk of his own district court had fashioned this means of delivery for me. Judge Politan should have been aware that since the **60** day period was noted on the summons and not the **20** day period of Rule 4(d)(1) which was required by Rule 12(a). When the trained U.S. Attorney waited over **120** days he automatically caused the defendants to be in default and the Supreme Court of the United States should rule this to be true and adjudge them to being in default. When the defendants finally answered, through the U.S. Attorney, on February 8, 1993, they acknowledged their acceptance of the U.S. Attorney as their chosen representative and must suffer from his mistakes.
AUTHORITY: Vance v. U.S., 126 F.R.D. 14 (E.D.N.Y. 1989).

Second- The Third Circuit panel on September 29, 1994, accepted all of the above and had ordered Judge Politan to **Vacate** his first Judgement Order and accordingly, issued its Mandate on November 8, 1994. Judge Politan was bound by the decree as the law of the case, and he was obligated to carry it into execution. I totally believed in the strength of the Judgement Order and its Mandate to settle this matter. I have always believed that the higher court's precept or order issued upon the decision of an appeal or writ of error, directing action to be taken, or disposition to be made of case, by an inferior court was final and to be unopposed by the lower court. If so disposed, within the required time frame, the respondent or his or her attorney can appeal the higher court's judgement however, in the case at bar, this did not happen. Instead, on March 28, 1995, Judge Politan took-up the U.S. Attorney's standard a second time and openly

opposed the Third Circuit's Judgement Order of September 29, 1994. I firmly believe that the panel on September 19, 1995 was in error to allow this to happen.

AUTHORITY: Judgement Order, September 29, 1994.
See, Appendix D (Pet. App. 16a-21a).
Also See, C.J.S., Federal Courts, () 301 (36) p. 1381.

Third- The Third Circuit's panel was openly critical of Judge Politan in his handling of the case at bar on September 29, 1994. They cited him for failure to reach the merits of my arguments with a charge against him of abuse of discretion for dismissing my complaint sua sponte without a factual inquiry or enunciating the reasons why such an inquiry was unnecessary and without providing me with prior notice of the impending dismissal of my claim. For this, Rule 4(j) reads as follows:

> **....."If the court is disposed to dismiss, sua sponte, which it can do under subdivision (j), the court itself must assure that the plaintiff has notice of its proposed action."**[1]

Judge Politan has not acted in good faith as required to do so by the Rule 4(j) and Rule 4(m),. It is right there, in black-and-white.

> **"In Smith-Bey v. Cripe, 852 F.2d 592 (1988), the District of Columbia Circuit stressed the requirement that the court give notice when the court is the movant."**

---

[1] "MUST"- This word, like the word "**shall**," is primarily of mandatory effect. State ex rel. McCabe v. District Court of the Third Judicial District, Deer Lodge County, 106 Mont., 272, 76 P.2d 634; and in that sense is used in antithesis to "**may**"." Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979. Also, "MUST," Indicating compulsion. Ordinarily a mandatory word. 50 Am J1st Stat § 28. In a statute, calling for substantial rather than literal compliance. Ballentine's Law Dictionary, Third Edition, Edited by William S. Anderson, 1969.

AUTHORITY: See: Smith-Bey v. Cripe, 852 F.2d 592 (1988), the District of Columbia Circuit.
Fed. R. Civ. P. 4(j) and 4(m).

After the Third Circuit's September 29, 1994, Judgement Order the U. S. Attorney had the opportunity to file a petition for a rehearing. **He did not do so and the time for this ran out.** Instead, on March 28, 1995, Judge Politan did the unthinkable thing and went contrary to the Third Circuit. Although he mentioned Rule 4(m) briefly, Pet. App. 10a, he never once mentioned Rule 4(e) in this entire document. He was mostly in argument with the findings of the Third Circuit on September 29, 1995. Rule 4(e) had been accepted by the Third Circuit and the Judge was not to dispute this finding.

Fourth- In this instant matter, Judge Politan had placed the entire case on **hold** as of January 9, 1995. In doing so he could rid himself of bothersome litigation in this case before the full **120** day time period could pass a second time after the case had been remanded to him on November 15, 1944, by the Third Circuit. However, time was also tolled in this case on January 9, 1995. When a case is placed on hold, by the Court, time stands still for the litigants. Due to the tolling of time, it is my belief that, the District Court owed me 65 more days before it could invoke Rule 4(j) the second time.

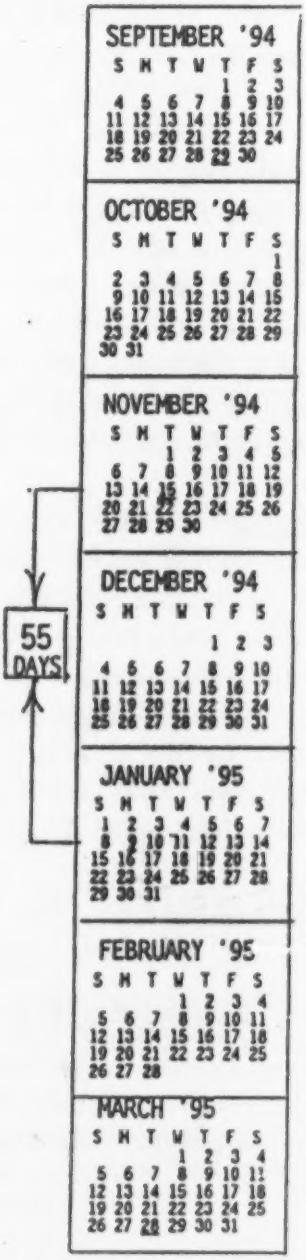
AUTHORITY: See: Ortiz v. Clarence H. Hacket, Inc., 581 F. Supp. 1258, (n.D. Ind, 1984, p. 1261.

> **"Limitations periods are regularly tolled when internal administrative procedures might frustrate compliance with statutory deadlines."**

For this same D.C. Case No. 92-3977, the Judgement Order that was rendered by the panel on September 29, 1994, C.A. No. 93-5508, was in favor of the petitioner. The complete **about-face** by the second panel on September 19, 1995, C.A. No. 95-5247, went against the Judgement order of C.A. 93-5508 and its Mandate. D.C. Civil No. 92-3977, had been previously adjudged as C.A. No. 93-5508, on September 29, 1994, by the U.S. Court of Appeals for the Third Circuit by Hon. Stapleton, Hutchinson and Roth,Circuit Judges.

Using Rule 4(j), the District Court Judge, Hon. Nicholas H. Politan, had ruled in favor of the respondents on May 4, 1993. Although I appealed this decision on August 5,1993, Judge Politan denied my appeal. The Third Circuit overthrew the May 4, 1993, decision on September 29, 1994, and on November 15, 1994, sent a certified copy of the order vacating the judgement order by the U.S. District Court of August 5, 1993, they then, remanded the action back to the District Court for further proceedings. This was C.A. No. 93-5508.

The remanded case was active from November 15, 1994, to January 9, 1995, when Judge Politan took the entire case under advisement and there was no legal activity between the litigants and



the Court after this date. A total of only 55 days. The clock was stopped by Judge Politan on January 9, 1995. Suddenly, on March 28, 1995, Judge Politan started the clock again and reissued his previous Court Order which was in favor of the respondents and again, as before, he based this second order on the application of Rule 4(j).

As before, this surprise action was without an oral hearing or a factual inquiry and this was only with 55 days of litigation. It would be logical to assume that, to function properly, Rule 4(j) must believe that there has been 120 days of legal activity between the Court and the litigants.

ISSUE II- Two year Statute of Limitations- Defense for OSHA, Judgement Order of January 25, 1993, signed by Judge Nicholas H. Politan (id) [Entry date 01/27/93]. See; APPENDIX (Pet. App. 42a-43a).

This case originated as a Section 11(c) complaint of unlawful discharge and was filed on October 13, 1981, OSHA case No. 2-4173-82-2, in the New York City office of Mr. Matthew A. Gilmartin. Mr. Arthur M. Johannes was the investigator assigned to my case. After a full year, on October 19, 1982, his determination was to close my case without protecting my rights under Section 11(c)(2) of the Act which was a violation of my right to due process of law. Although I asked to have a copy of his full report this was denied to me. On January 27, 1983, I filed an appeal which was also denied. I continued to diligently pursue my case through 1985 however, it was extremely difficult without the Johannes 1982 report. In 1986, I hired an attorney. On February 4, 1986, my attorney sent OSHA a FOIA letter on my behalf, to Mr. Gilmartin, requesting a copy of the Johannes report. Over a year later, on June 18, 1987, we received a heavily censored version from Mr. Gilmartin.

When Judge Politan ruled to dismiss the complaint of September 21, 1992, against OSHA he determined that OSHA had sovereign immunity and my accrual date was in 1987, which was the year I had received part of my papers. **This was not true. For the defense of sovereign immunity see TORT CLAIMS PROCEDURE, 28 § 2674, Note 51:**

> **"In general, United States maintains sovereign immunity from tort actions brought by private individuals; however, federal Tort Claims Act provides that United States may be subject to suit and liability for personal injuries caused by negligent acts of government employees acting within scope of their employment in same manner as private individual. Moye v. U.S., E.D.N.C. 1990', 735 F.Supp. 179.**
>
> **In claim under the Federal Tort Claims Act, United States is liable for plaintiff's damages if under same circumstances private person would be liable. Elkins v. U.S., D>C>Va.1969, 307 F. Supp. 700, affirmed 429 F.2d 297. See, also, U.S. v. Gavagen, C.A.5 (Fla.) 1960, 280 F.2d 319, certiorari denied 81 S.Ct. 379, 364 U.S. 933, 5 L.Ed.2d 365: Wenzel v. U.S., D.C.Idaho 1964, 225 F.Supp. 726: Marcum v. U.S., D.C.Ky.1962, 208 F. Supp. 929, affirmed 324 F.2d. 787; McNamara v. U.S., D.C.D.C.1961, 199 F.Supp. 879; Globig v. Green & Gust Co., D.C.Wis. 1960, 184 F.Supp. 530: Wheeldon v. U.S., D.C.Cal.1960, 184 F.Supp. 81: White v. U.S., D.C.Cal.1951, 97 F.Supp. 12.**
>
> **Under this chapter and section 1346(b) of this title liability of government is judged in same manner that liability of private individual is judged under state law. Moenck v. U.S., D.C.**

Iowa 1966, 264 F.Supp. 615."

With the preceding, probably quite well known to Judge Politan, from the numerous cases cited, he immediately seized upon the U.S. Attorney's claim of sovereign immunity for OSHA.

In furtherance of my case, after 1987, I had continued to try and reason with OSHA through correspondence and Congressman Torricelli's office and eventually, in 1991, I hired a new attorney to try and get my complete file and thus determine the extent of my claim against OSHA. On November 10, 1991, my attorney wrote to the OSHA Review Commission on my behalf. OSHA never replied to this letter and, as stated above, I filed my complaint at the Federal District Court in Newark, N.J., on September 21, 1992. Although, I continued to try to attain discovery through the district court I was completely blocked at every turn. Finally I made a FOIA search through OSHA and labor department offices on my own. Ultimately, the issue of case file No. 2-4173-82-2, was resolved by a disclosure letter dated March 2, 1994, from Mr. Gilmartin, in which he admitted to the fact that these OSHA documents were destroyed by him, in his office, in 1989. On this, his words were as follows:

> ..."**Please be advised that the referenced documents were never submitted by this office to the National Records Center but were destroyed by this office in 1989 pursuant to OSHA instructions ADM 12.7 2A Ch.1".**

OSHA Instruction ADM 12-7, 2A CH-1, from the Office of Management Systems and Organization state this rule from March 14, 1988, to be as follows:

> "D. **Explanation of Changes. The disposition instructions of item 38, Discrimination Complaint Case Files, are changed to reflect requirements that**

they be transferred to the records center 2 years after the case is closed instead of the currently 3 years after the case is closed.

It does not say that they may be destroyed, at whim. within the office of Mr. Matthew A. Gilmartin. In doing so, this was a blatant disregard for the rule. To be exact, I was informed by an official in the Bayonne, New Jersey, Record Center, that when the date for destroying old records comes due, they inform the office of its origin of this fact in writing. The office having the original authority must then inform the Record Center, in writing, to authorize the destruction of these old files. After receiving this authorization then and only then can the files be destroyed. In no way, does this compare with Mr. Gilmartin's method of convenience. These Section 11(c) records are U.S. Government property of serious content, the disposition of which must not be handled in a totally personal and negligent manner. The object of the Record Center, with its regulations and orderly system is there for a purpose. When Mr. Gilmartin circumvents the system his purpose is questionable as well as being a serious breach of OSHA regulation ADM 12-7, 2A CH-1.

In view of my 1987 FOIA request these papers should have been protected for six years, to 1993. On April 13, 1994, Mr. Bruce A. Cohen, Deputy Associate Solicitor for Legislation & Legal Counsel, of the U.S. Department of Labor in a letter to me wrote:

"Documents relating to FOIA requests can be destroyed six years after the date of the initial request. Although our office has not yet destroyed records related to your appeal, OSHA has informed us that its records relating to your request have been destroyed."

In doing this unlawful act in 1989, Mr Gilmartin has brought his act of actionable fraud against me through the year of 1993, which

would have been the projected date for the lawful demise of this file. Also, to be finally informed on March 2, 1994, this could serve as my accrual date. The courts have generally defined a right as accruing upon the occurrence of the final event necessary to complete the element of the claim. I believe that there is no sovereign immunity for OSHA. Also, in view of the preceding, The Federal Tort Claims Act allows that there may be no sovereign immunity for OSHA. **AUTHORITY: United States v. Sams, 521 F.2d 421, 429 (3rd Cir. 1975), and Tort Claims Procedure, 28 § 2674, Note 51, Moye v. U.S., E.D.N.C. 1990, 735 F.Supp. 179.**

REASONS FOR GRANTING THE WRIT

1- In a close time span of one year and for the same case number and for the same District Court's Judgement Order and when there has been no change in the Rule, there were two conflicting Judgement Orders from two separate panels in The United States Court of Appeals for the Third Circuit.

2- Rule 4(j) must assume that there has been 120 days of active court litigation and when a case is put on hold by the court, time stands still.

3- The drafters of the Rule must have intended that it be enforced in its entirety and the District Court Judge can not capriciously, select only those parts that are to his liking. It is a common practice, when proving a point of law, to quote the authority. However, when taken out of context, to prove a point, disregarding the remainder which may be contrary to one's idea is truly an unconscionable act.

4- If a Court Judge is to hold the petitioner to the Rule s/he must also hold the respondent to the Rule. The law sets the

petitioner's time of service to start at the time the case is filed with the court. When the respondent accepts service and in an effort to evade the acknowledgement of service, he or she silently waits for the **120** day time frame to pass s/he is simply out-of-time. The Rule must be as a two edged sword that can cut both ways and **equal protection must prevail.**

5- More often than not, over a period of time and in the course of litigation, new evidence may be discovered which can have a great bearing on the outcome. When this evidence is properly presented in motion to the court under Rule 60(b), the court should be conscientious in their desire to attain true justice under the law. For this, throughout the case's progression, the court must endeavor to remain open to and to be cognizant of all the facts by inspecting all facts when properly presented. In this instant matter, on March 28, 1995, there is a clear indication that the court committed an error in rejecting factual evidence as timely presented under Rule 60(b), by not revisiting the Judgement Order of January 27, 1993.

CONCLUSION

It is my belief, that for **Issue I**, the laws pertaining to the facts of this 1995, D.C. Case No. 92-3977 have not changed during this time and since the issues and facts for this case at bar, are the **same** as they were in 1994, C.A. No. 93-5508, I believe that the September 29, 1994, Judgement should have stood and the 1995 panel should have repeated the 1994 ruling by the Hon. Stapleton, Hutchinson and Roth, Circuit Judges.

For **Issue I**, I respectfully request that the Supreme Court of the United States accept my case for review and judge the matter of case law pursuant to Federal Rules of Civil Procedure 4(j) in its entirety, **should** it apply to this D.C. case No. 92-3977. To then, uphold the ruling of Smith-Bey. Also, the Supreme Court should acknowledge

the fact that Rule 4(j) requires **120** days of active litigation and not a mere **55** days. Also, after I notified the respondents that they were in default on January 25, 1993, they purposely waited an additional **14** days to February 8, 1993, after the full **120** days had elapsed, before they answered to claim their dissatisfaction with the delivery of process of October 6, 1992. By holding the summonses for over **122** days the respondents were out-of-time with their complaint. With the mandate of the Fourteenth Amendment to the Federal Constitution of the United States, the **equal protection** clause requires that persons under like circumstances be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs. On January 25, 1993, the petitioner's default motion was timely filed. On February 8, 1993, the respondents and their trained U.S. Attorney were simply out-of-time. The Supreme Court of the United States should rule the default motion of January 25, 1993, to be affirmed and above all, the Supreme Court should hold the primary judgement and its Mandate of September 29, 1994, to be of the higher authority and over the second judgement and its Mandate of September 19, 1995.

For **Issue II**, the OSHA Statutes are designed as remedial legislation to provide a safe place for the American Workers and to prevent retribution from being visited on employees who report hazardous working conditions to OSHA. When these government officials shirk their sworn duty and conspire to deny a person of his or her civil or statutory rights, the time from which the statute of limitations starts is the date the conspiracy ends. See, Cartolano v Tyrrel, 421 F.Supp. 526 (N.D. Ill. 1976).

Respectfully Submitted

Robert E. Mates, Pro se
342 Windsor Road
Englewood, N.J. 07631
(201) 569-3852

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5247

ROBERT E. MATES,
Appellant

V.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MATTHEW A. GILMARTIN, Regional Supervisor Investigator; ARTHUR M. JOHANNES, Acting Supervisory Investigator; THORNE G. AUCHTER, Former Assistant Secretary; JOHN B. MILES, JR., Director of Field Operations; GEORGE SALEM, Solicitor of Labor; SETH D. ZINMAN, Associate Solicitor for Legislation and Legal Counsel; JOHN A. PENDERGRASS, Former Assistant Secretary; PATRICK R. TYSON, Former Acting Assistant Secretary; GERALD P. REIDY, JR., Regional Administrator.

SUR PETITION FOR REHEARING

Present: MANSMANN, ALITO and ROTH, Circuit Judges.

The petition for panel rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the

petition for panel rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Oct. 16, 1995

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5247

ROBERT E. MATES,
Appellant

V.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MATTHEW A. GILMARTIN, Regional Supervisor Investigator; ARTHUR M. JOHANNES, Acting Supervisory Investigator; THORNE G. AUCHTER, Former Assistant Secretary; JOHN B. MILES, JR., Director of Field Operations; GEORGE SALEM, Solicitor of Labor; SETH D. ZINMAN, Associate Solicitor for Legislation and Legal Counsel; JOHN A. PENDERGRASS, Former Assistant Secretary; PATRICK R. TYSON, Former Acting Assistant Secretary; GERALD P. REIDY, JR., Regional Administrator.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 92-cv-03977)
District Judge: Honorable Nicholas H. Politan

Submitted Under Third Circuit LAR 34.1(a)
August 16, 1995
Before: MANSMANN, ALITO and ROTH, Circuit Judges.

JUDGEMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Sep 19 1995

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FILED
Mar 28 1995
AT8:30 12:05 PM
WILLIAM T. WALSH
CLERK

Robert E. Mates,	:	CIVIL ACTION NO. 92-3977
Plaintiff,	:	HON. NICHOLAS H. POLITAN
v.	:	ORDER
OCCUPATIONAL SAFETY: AND HEALTH ADMINISTRATION,et al,	:	
Defendants.:		

THIS MATTER having come before the Court on the individual defendants' motion for a judgement on the pleadings and on plaintiff's motion for recusal; and the Court having fully reviewed the submissions of the parties and having considered the matter without oral argument pursuant to Fed.R.Civ.P. 78; and for good cause shown as set forth more fully in the accompanying Letter Opinion;

IT IS on this 28th day of March, 1995,

ORDERED that plaintiff's motion for recusal be DENIED; and it is further

ORDERED that defendant's motion for a judgement on the pleadings be **GRANTED** and that plaintiff's complaint be **DISMISSED WITHOUT PREJUDICE.**

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST., ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

FILED
Mar 28 1995
AT8:30 12:05 PM
WILLIAM T. WALSH
CLERK

March 28, 1995

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Mr. Robert E. Mates
342 Windsor Road
Englewood, N.J.
Plaintiff Pro Se

Andrew O. Schiff, Assistant
U.S. Attorney
FAITH S. HOCHBERG, UNITED
STATES ATTORNEY
402 East State Street
Room 502
Trenton, N.J. 08608
Attorneys for Defendant

Re: Robert E. Mates
v. Occupational Safety and
Health Administration, et al
Civil Action No. 92-3977 (NHP)

Dear Litigants:

This matter comes before the Court on defendants' motion for judgement on the pleadings, and on plaintiff's motion for recusal. Defendants' motion comes in response to the Third Circuit's vacation of this Court's earlier sua sponte dismissal of plaintiff's complaint without prejudice for lack of sufficient service of process. The Court now revisits that determination pursuant to mandate of the Third Circuit Court of Appeals and on defendants' motion.

RECUSAL

As an initial matter the recusal motion must be considered. Plaintiff has moved to have this Judge recuse himself from this case on several grounds: because the Third Circuit vacated one of my earlier rulings in the case; because plaintiff believes I am biased against pro se litigants; and because he, plaintiff, cannot "receive any degree of justice" from me.

Plaintiff has captioned his motion as falling under 28 U.S.C. § 455, although he has submitted a certification in apparent compliance with 28 U.S.C. §144. Under either section, a judge must recuse him or herself when a personal bias or prejudice might cloud the judge's conduct or rulings in the case. Such bias or prejudice, however, must be sufficiently established by the party seeking recusal or by the judge him or herself before recusal is mandated. See 28 U.S.C. §§ and 145; Jones v. Pittsburgh Nat'l Corp., 899 F. 2d 1350, 1356 (3d Cir. 1990). In a recusal motion premised on 28 U.S.C. § 144, all allegations and contentions made

by the movant should be considered true for the purposes of the motion. United States v. Vespe, 868 F. 2d 1328, 1340 (3d Cir. 1989). To merit disqualification, only bias which is extrajudicial will suffice. Id. However, "when a judge displays 'pervasive bias' towards the party seeking recusal regardless of the source of the bias[,]" recusal is also appropriate. United States v. Rosenberg, 806 F.2d 1169, 1174 (3d Cir. 1986), cert, denied, 481 U.S. 1070 (1987). If the allegations raised in support of a motion for recusal amount to "no more than a disagreement with the legal conclusions reached by the district judge [,]" no legitimate ground for recusal exists. See Jones, supra, 899 F.2d at 1356.

In the instant case, I find that plaintiff has failed to establish that my conduct in this matter reflects any bias or prejudice against either him personally or as a pro se litigant. Likewise, the mere fact that the Third Circuit has seen fit to disagree with some of my rulings in this case is not enough to suggest that I might be predisposed one way or another in the litigation. That plaintiff may disagree with my legal rulings from time to time is his prerogative, but it does not substantiate any allegation by him that he cannot receive any degree of justice in this Court. As established by the defendant's opposition to plaintiff's recusal motion, the specific incidents recited in plaintiff's certification suggesting bias or prejudice on my part were contextually inaccurate and are insufficient to mandate recusal in this case. Without rehashing the allegations and incidents raised, suffice it to say that plaintiff has fallen far short of either the Jones or Rosenberg justifications for recusal. As such, this Court shall not recuse itself in the instant case.

MOTION FOR JUDGEMENT ON THE PLEADINGS

Plaintiff's allegations were summarized in this Court's Letter Opinion dated May 4, 1993, and need not be reiterated herein. The procedural history of this case, however, being the foundation of defendants' motion is noteworthy.[1]

Plaintiff's complaint was filed on September 21, 1992, against the individual defendants. On January 25, 1993, plaintiff moved to have the individual defendants adjudged in default. The defendants answered plaintiff's complaint on February 8, 1993, asserting the defense of improper service. In addition, defendants at that time responded to plaintiff's default motion and sought judgement on the pleadings. On May 4, 1993, the Court denied plaintiff's default motion and dismissed the matter sua sponte for failure to comply with Fed.R.Civ.P.4(d)(1). At that time the Court noted that even if plaintiff's claim against the individual defendants impacted their respective official capacities, plaintiff also failed to properly effectuate service under Fed.R.Civ.P. 4(d)(4) and (5). Reconsideration of the May 4, 1993 ruling was denied on August 5, 1993.

The Third Circuit Court of Appeals vacated this Court's denial of plaintiff's request for reconsideration, but refused on plaintiff's motion for rehearing -- to second-guess this Court's dismissal of OSHA as a defendant in this action. Therefore. the disposition of the claims against OSHA need not be revisited. See Cowgill v. Raymark Industries, Inc., 832 F.2d 798, 802 (3d Cir. 1987).

---

[1] In light of opinion expressed by the Third Circuit, the issue is more focussed than the plaintiff contends. The Third Circuit's opinion and order vacated this Court's August 5, 1993, denial of plaintiff's motion for reconsideration of this Court's dismissal of plaintiff's complaint on May 4, 1993. As such, this Court's Order dismissing OSHA, dated January 28, 1993, remains intact and need not be revisited. Thus only the claims as against the individual defendants are the subject of this Letter Opinion.

It is well established that district courts have discretion to either quash improper service of process or to dismiss a complaint where plaintiff has failed to properly serve a defendant. Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). "Fed.R. Civ.P. 4(j) []² requires dismissal of a plaintiff's complaint without prejudice if, absent a showing of good cause, the plaintiff does not make service within 120 days after he files his complaint." Id. at 31 (footnote omitted). In the matter sub judice, plaintiff had failed to make proper service on the individual defendants at the time this Court dismissed his complaint without prejudice on May 4, 1993.

This Court's Letter Opinion of May 4, 1993, dealt at length with the service opinions provided by Fed.R.Civ.P. 4(d). The Court's position was then, and still remains, that service upon the U.S. Attorney's office did not constitute proper service upon the individual defendants in their unofficial capacities. Moreover, even if being sued in their official capacities, these defendants did not receive copies of the summons and complaint as prescribed by Fed.R.Civ.P. 4(d)(4) and (5). As such, dismissal without prejudice sua sponte was appropriate.

The Third Circuit has expressed concern as to the manner in which this Court dismissed plaintiff's complaint. In view of the Third Circuit panel, notice aught to have been given plaintiff -- although the Third Circuit conceded that the order of dismissal itself served as notice, and provided the opportunity to show good cause for his failure to properly serve the individual defendants. However, considering the time frame involved, notice of pending dismissal for failure of service would have done nothing to improve plaintiff's situation -- "[n]otice . . . does not operate as an automatic

---

² The language of Fed.R.Civ.P. 4(j) has, as of December 1, 1993, been subsumed within Rule 4(m), pursuant to the 1993 Amendments to the Federal Rules of Civil Procedure.

extension, nothing in the rule or its interpretations construes it this way." Braxton v. U.S., 817 F.2d 238, 241 (3d Cir. 1987). Therefore, the lack notice in this case was of no moment to plaintiff's position.

Plaintiff did in fact exercise his right to come forward with reasons for his failure to properly serve the individual defendants. In his motion for reconsideration of this Court's May 4, 1993 decision, Mr. Mates exercised his right to show good cause why he had not properly served the individual defendants. In accordance with the Third Circuit's mandate, the Court has reviewed plaintiff's motion for reconsideration coupled with his current opposition to the defendants' motion for judgement on the pleadings and has considered plaintiff's good cause showings therein.

In his motion for reconsideration, plaintiff contended that process was properly served upon the individual defendants by service on the U.S. Attorney's office. In light of plaintiff's status as a pro se litigant, it is appropriate for the Court to be lenient in reviewing his service. Poulakis v. Amtrak, 139 F.R.D. 107, 109-10 (N.D.Ill. 1991). However, pro se status does not completely relieve a plaintiff of his duty to properly serve defendants. Cheek v. Doe, 110 F.R.D. 420, 422 (N.D.Ill. 1986). See also Appollo Technologies v. Centrosphere Indus., 805 F.Supp. 1157, 1187 (D.N.J. 1992). A plaintiff's status -- pro se or represented -- cannot dilute the need to properly and officially serve defendants and appraise them of their rights. Even actual notice of the suit against him or her is no substitute for sufficient service on the defendant. Cheek, 110 F.R.D. at 422. As such, plaintiff's contention in this case that the individual defendants knew, via the US Attorney, that they were being sued is not enough to absolve plaintiff of the need to properly serve process on them.

Plaintiff's claims against the individual defendants may be in either or a combination of two forms -- in their official and/or unofficial capacities. This Court found, in its May 4, 1993 Opinion, that in either form plaintiff's service of process was inadequate. In light of the Third Circuit's concerns, the Court now revisits that issue.

The Third Circuit acknowledged that:

> [t]he applicable method of service under Rule 4(d) depends upon the theory under which a party proceeds. When money damages are sought from a public official in his individual capacity . . . the plaintiff must proceed under the terms of Rule 4(d) and effect personal service.

Micklus v. Carlson, 632 F.2d 227, 240 (3d Cir. 1980) (citations omitted). See Also 4A Charles A. Wright 7 Arthur R. Miller, Federal Practice & Procedure, § 1107 at 163 (1987); James A. Moore et al, Moor's Federal Practice § 4.29 at 4-240-41 (2d ed 1993). Personal service demands delivery of a copy of the summons and complaint personally upon the defendant or leaving it at the defendant's dwelling with a person of suitable age and description. Fed.R.Civ.P. 4(d)(1). Alternately, the defendant may be served pursuant to the law of the state in which the District court sits (Rule 4(c)(2)(C)(ii) or by mail in compliance with Rule 4(c)(2)(C)(ii). In the instant case, none of these forms of service were utilized by plaintiff. Absent a showing of good cause why these forms of process service were not used by plaintiff, the complaint must be dismissed without prejudice pursuant to Fed.R.Civ.P. 4(j).

Plaintiff's service upon the individual defendants by effecting service on the US Attorney's office was insufficient as to his Bivens[3] actions against them. Micklus, 632 F.2d at 240. Therefore,

---

[3] Bivens v. Unknown Named Agents, 403 U.S. 388 (1971).

plaintiff's claim that such service and its acceptance satisfied Rule 4(d)(1) constituted good cause as to why proper service was not accomplished must be scrutinized.

> In determining what constitutes good cause to avoid a Rule 4(j) dismissal, courts have stated that the good cause standard requires at least as much as would be required to show excusable neglect under Rule 6(b)(2). See Braxton [v. United States], 817 Third Circuit has stressed that the 120 day time limit should be strictly applied and has noted that the legislative history provides only one example where an extension of good cause would be permissible: when the defendant intentionally evades service of process. See Lovelace v. Acme Markets, Inc., 820 F.2d 81, 84 (3d Cir.), cert. denied, ___ U.S.___ (1987). Half-hearted efforts will not excuse a delay in service, especially when plaintiff's lack of diligence is evident. See id. at 84-85; Braxton, 817 F.2d at 241.

Abdel-Latif v. Wells-Fargo Guards Services, Inc., 122 F.R.D. 169, 174 (D.N.J. 1988) (action was dismissed because of plaintiff's dilatory efforts to serve).

Applying this scrutiny to plaintiff's "good cause" claims in the instant case, the Court finds that plaintiff's failure to properly serve individual defendants cannot survive. In the matter sub judice, there has been no showing that the defendants intentionally attempted to evade service. Plaintiff mistakenly concluded that acceptance of service by the us Attorney's office constituted proper service on the individual defendants. As shown by case law above, however, such a conclusion was not justified. Secondly, plaintiff contended that OSHA's refusal to cooperate with his requests for the addresses of

the individual defendants prevented him from effecting proper service. Absent a showing by plaintiff of diligent efforts, however, such a contention cannot suffice to excuse improper service.

Plaintiff represented in his motion for reconsideration that he wrote to OSHA seeking the addresses of the individual defendants on August 24, 1992. No other direct effort was made to discover this information, although other means were available. Indeed, plaintiff's papers in opposition to the instant motion make no mention of his having at any time since this Court's May 4, 1993 Order -- which amounted to a notice of dismissal, if not more -- made any effort to effectuate proper service on the individual defendants. Such failure is relevant to the Court's present determination. There is sufficient case law to indicate that at least some effort must be made to independently track down defendants before good cause for insufficient service can be established to excuse improper service. See, e.g., Llewellen v. Morley, 909 F.2d 1037, 1075-76 (7th Cir. 1990) (plaintiff's contentions that the US Attorney accepted service, stonewalled plaintiff's efforts to get the defendants' addresses, and failed to timely raise the defense of improper service were not sufficient to establish "good cause"); Geiger v. Allen, 850 F.2d 330 (7th Cir. 1988) (neither "inadvertent failure to serve" nor "halfhearted efforts to serve" excused plaintiff's improper service): Martin v. City of New York, 627 F.Supp. 892, 900-01 (E.D.N.Y. 1985) (plaintiff's failure to exhaust the options available to discover defendant's address merited dismissal, despite co-defendant's refusal to furnish plaintiff with that information).

In the instant case, the efforts attested to by the plaintiff to discover other information allegedly kept from him by OSHA have been cast in Herculean light in his opposing brief, and yet no showing of separate efforts to discover defendants' addresses has been made. As such, despite his pro se status, the Court cannot conclude that a single letter -- not followed by either procedural or

other methods of inquiry (telephone book, etc.) -- amounted to good cause for excusing improper service on these Bivens defendants.

Assuming, alternatively, that plaintiff's claims against the individual defendants were premised on the latter's official roles, the insufficiency of the service was shown in this Court's Letter Opinion dated May 4, 1993, page 5 n.1 (applying Fed.R.Civ.p. 4(d)(4) and (5).

Based on the foregoing, upon this Court's revisitation of record in this matter, it is clear that dismissal without prejudice of plaintiff's claim on May 4, 1993, was appropriate. In reviewing plaintiff's motion for reconsideration of that ruling in light of the Third Circuit's mandate, the Court -- having reached the merits of plaintiff's motion -- finds that he failed to show good cause for his improper service of the individual defendants. As such, the Court again DISMISSES plaintiff's complaint without prejudice.

An appropriate Order accompanies this Opinion.

/s/ Nicholas H. Politan
Nicholas H. Politan
U.S.D.J.

APPENDIX D
NOT-FOR-PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5508

ROBERT E. MATES,
Appellant

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MATTHEW A. GILMARTIN, Regional Supervisor Investigator; ARTHUR M. JOHANNES, Acting Supervisory Investigator; THORNE G. AUCHTER, Former Assistant Secretary; JOHN B. MILES, JR., Director of Field Operations; GEORGE SALEM, Solicitor of Labor; SETH D. ZINMAN, Associate Solicitor for Legislation and Legal Counsel; JOHN A. PENDERGRASS, Former Assistant Secretary; PATRICK R. TYSON, Former Acting Assistant Secretary; GERALD P. REIDY, JR., Regional Administrator.

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 92-3977)
(District Judge: Hon. Nicholas H. Politan)

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 25, 1994
Before: STAPLETON, HUTCHINSON AND ROTH, Circuit Judges

(Opinion Filed Sep 29 1994)

OPINION OF THE COURT

ROTH, Circuit Judge:

Plaintiff-appellant Robert E. Mates appeals from the district court's denial of his Rule 60(b) motion. Pursuant to Federal Rule of Civil Procedure 4(j), the district court had previously dismissed his complaint sua sponte without prejudice as to the individual defendants named therein for failure to prosecute. We vacate and remand for further proceedings consistent with this opinion.

I.

Robert E. Mates filed a pro se complaint on September 21, 1992 against the Occupational Safety and Health Administration ("OSHA") and nine former and present employees of the United States Department of Labor. Alleging various violations of his constitutional and statutory rights, he sought damages for injuries that he allegedly suffered as a result of defendants' mishandling of a complaint that he had filed in 1981 pursuant to the Occupational Safety and Health Act. Mates directed the Sheriff of Essex County to serve the United States Attorney's Office in Newark, New Jersey with the complaint and summons. He claimed that OSHA would not provide the addresses of the individual defendants, preventing him from serving them directly.

Because they did not answer the complaint or otherwise move, Mates filed a motion to enter a default judgement against the individual defendants on January 25, 1993.[1] In response, the

1. By order entered January 28, 1993, the district court granted OSHA's motion to dismiss the complaint as against OSHA. The court subsequently denied Mates' motion for reconsideration of January 28 order.

In response, the individual defendants filed an answer to the complaint raising the affirmative defense of improper service, a response to the motion for default judgement, and cross-motion for judgement on the pleadings.

By order entered May 5, 1993, the district court dismissed the complaint sua sponte without prejudice as to the individual defendants for failure to serve summons within 120 days of filing the complaint, pursuant to then Rule 4(j) of Federal Rules of Civil Procedure.[2] The court, however, failed to supply notice to Mates prior to notice to Mates prior to the dismissal.

On May 19, 1993, Mates filed a motion for reconsideration of the dismissal, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Noting that the court had not allowed opportunity to show good cause for failure to serve the individual defendants within 120 days, Mates set forth his good cause argument therein. The court denied Mates' motion by order entered August 5, 1993, without reaching the merits of his argument. Mates timely appealed. In addition, he filed a motion to protect all documents related to the action.

---

2. Subsequent to the court's order, on December 1, 1993, the 1993 Amendments to the Federal Rules of Civil Procedure went into effect. Rule 4(m) now contains much of the language in the former rule 4(j). The new rule states in part:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m).

Because the district court abused its discretion by denying Mates' motion for reconsideration without reaching the merits, we vacate the judgement and remand the case to the district court for further proceedings. We dismiss the plaintiff's motion to protect documents as moot.

II.

We review a district court's denial of a 60(b) motion for abuse of discretion. Lorenzo v. Griffith, 12 F.3d 23, 26 (3d Cir. 1993). Likewise, a district court's sua sponte dismissal of a cause of action pursuant to Federal Rule of Civil Procedure 4(j) is revisited for abuse of discretion. Lovelace v. Acme Markets, Inc., 820 F.2d 81, 83 (3d Cir. 1987), cert denied 484 U.S. 965 (1987).

III.

Although the district court properly concluded that Mates did not effect service on the individual defendants as required pursuant to the Rule, the question remains whether the court properly dismissed the complaint pursuant to Fed. R. Civ. P. 4(j) (1993).[3]

Rule 4(j) provides that:

> If a service of the summons and complaint is not made upon a defendant within 120 days after filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j) (1993).

---

3. We assume, as did the district court, that the plaintiff was attempting to sue the nine named defendants in their individual capacities and was therefore required to comply with Fed. R. Civ. P. 4(d)(1) (1993). We note that pursuant to amendments effective December 1, 1993, Rule 4(e) replaced former subdivisions 4(c)(2)(C)(i) and 4(d)(1) in specifying a means for service of summons on individuals within a judicial district of the United States.

In effect, plaintiff argues that the district court failed to follow Rule 4(j) by dismissing his complaint sua sponte without providing him with prior notice of the impending dismissal of his claim. While conceding that Mates lacked such notice, Appellees argue that the court's procedural mistake constituted harmless error and did not prejudice Mates. They assert that the district court's order of dismissal effectively provided Mates notice of the issue and the opportunity to show good cause for failure of notice.

Arguably the court's order did provide notice, albeit not according to the procedure established by the drafters of Rule 4(j).[4] The district court, however, abused its discretion by summarily denying the motion for reconsideration without considering plaintiff's good cause argument on the merits. Faced with the plaintiff's allegations that good cause existed, the district court should have either initiated a factual inquiry or enunciated the reasons why such an inquiry was unnecessary and reconsideration inappropriate.[5] The failure to do so was particularly inappropriate given the potential for confusion among pro se claimants such as Mr. Mates.

---

4. See Ruiz Varela v. Sanchez Velez, 814 F.2d 821, 824 (1st Cir. 1987) (holding, where a complaint was dismissed pursuant to Rule 4(j) without notice, that a district court's order of dismissal itself may suffice to give a plaintiff notice and opportunity to argue good cause for the failure of service); Whale v. United States, 792 F2d 951, 952 (9th Cir. 1986).

5. See Ruiz Varela v. Sanchez Velez, 814 F.2d at 824 (vacating the district court's dismissal of an action pursuant to Fed. R. Civ. R. 4(j) where, although the plaintiff provided evidence showing good cause for failure to serve the defendant, the court neither conducted an evidentiary hearing regarding the allegation nor stated reasons explaining why such a factual inquiry was unnecessary).

IV.

Accordingly, the judgement of the district court is vacated. The case is remanded to the district court for further proceedings consistent with this opinion. And the plaintiff's motion to protect documents is moot.

TO THE CLERK;

Please file the foregoing Opinion.

/s/ Jane Roth
Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST., ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

FILED
Aug 05 1993
AT8:30 11:15 AM
WILLIAM T. WALSH
CLERK

August 5, 1994

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Mr. Robert E. Mates
342 Windsor Road
Englewood, N.J.
Plaintiff Pro Se

Andrew O. Schiff, Assistant
U.S. Attorney
MICHAEL CHERTOFF, UNITED
STATES ATTORNEY
U.S. Department of Justice
970 Broad Street
Room 502
Newark, N.J. 07102
Attorneys for Defendant

Re: Robert E. Mates
v. Occupational Safety and
Health Administration, et al
Civil Action No. 92-3977 (NHP)

Dear Litigants:

This matter comes before the Court on plaintiff's motion for reconsideration of this court's May 4, 1993 Letter Opinion and Order dismissing plaintiff's complaint without prejudice pursuant to Fed.R.Civ.P. 4(j). In a motion for reconsideration of a prior decision, the movant must set forth concisely the "matters or controlling decisions which counsel believes the Court has overlooked." General Rule 121. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986).

In the present case, there is no indication that the Court committed a clear error in interpreting the law or facts.

Accordingly, defendant's motion (should be plaintiff's motion) for reconsideration is DENIED.

SO ORDERED:

/s/ Nicholas H. Politan
Nicholas H. Politan
U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CHAMBERS OF
NICHOLAS H. POLITAN JUDGE

P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

FILED
May 04 1993
AT8:30 11:00 AM
WILLIAM T. WALSH
CLERK

May 04, 1993

LETTER OPINION AND ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

Mr. Robert E. Mates
342 Windsor Road
Englewood, N.J.
Plaintiff Pro Se

Andrew O. Schiff, Assistant
U.S. Attorney
MICHAEL CHERTOFF, UNITED
STATES ATTORNEY
U.S. Department of Justice
970 Broad Street
Room 502
Newark, N.J. 07102
Attorneys for Defendant

Re: Robert E. Mates
v. Occupational Safety and
Health Administration, et al
Civil Action No. 92-3977 (NHP)

Dear Litigants:

This matter comes before the Court on plaintiff's motion to enter default against the individual defendants and the individual defendants' cross motion for judgement on the pleadings. For the reasons outlined below, plaintiff's motion is DENIED and plaintiff's complaint against the individual defendants is DISMISSED WITHOUT PREJUDICE pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On September 21, 1992, plaintiff Robert E. Mates filed this action seeking $1,250.00 in compensatory and punitive damages against the Occupational Safety and Health Administration ("OSHA") and several former and present employees of the United States Department of Labor. The individual named defendants are as follows: Matthew A. Gilmartin, Regional Supervisor Investigator; Thorne G. Auchter, former Assistant Secretary; Gerald P. Reidy, Jr., Regional Administrator; John B. Miles, Jr., Director of Field Operations; George R. Salem, Solicitor of Labor; Seth D. Zinman, Associate Solicitor for Legislation and Legal Counsel; John A. Pendergrass, former Assistant Secretary; Patrick R. Tyson, former Acting Assistant Secretary.

In Count 1 of the complaint, plaintiff alleges that the defendants continually violated OSHA "statutes either intentionally with negligence, gross negligence, and with willful and wanton acts."...In Count 2 of the complaint, plaintiff alleges that the defendant violated his right to due process as secured by the Fifth Amendment of the United States Constitution. In Count 3 of the Complaint, plaintiff alleges that the defendants conspired to violate his rights under federal statutes and the United States Constitution.

After the filing of the complaint, defendant OSHA moved to dismiss the complaint as against OSHA. I granted that motion rendering an oral decision on January 25, 1993. An Order dismissing the case as against defendant OSHA was entered on January 27, 1993. The individual defendants did not answer the Complaint or otherwise move. Plaintiff thereafter filed the instant motion to enter default against the individual defendants. The individual defendants. opposed the motion on the ground that personal service was never effected. The individual defendants have also cross moved for judgement on the pleadings on the ground that plaintiff's action is time-barred by the applicable statute of limitations.

DISCUSSION

Plaintiff requests this court to enter default against the individual defendants named in this Complaint. Before the court may enter a default, "the party against whom the judgement is sought . . . must have been effectively served with process." 10 Charles A. Wright & Arthur R, Miller, Federal Practice and Procedure: Civil 2d § 2682, at 407 (1983). Assuming that plaintiff was attempting to sue these defendants in their individual capacities, proper service requires compliance with Rule 4(d)(1) of the Federal Rules of Civil Procedure. See Micklus v. Carlson, 632 F.2d. 227, 240 (3d Cir. 1908) ("Where money damages are sought from a public official in his individual capacity, service . . . under Rule 4(d)(5) is sufficient. Instead, the plaintiff must proceed under the terms of Rule 4(d)(1)"). Rule 4(d)(1) provides alternative methods by which a party may effectuate proper service upon an individual defendant. In the instant case, plaintiff claims to have served an agent authorized to receive service consistent with Fed.R.Civ.P. 4(d)(1).

The Affidavits of Service attached to plaintiff's certification in support of his motion indicate that the Deputy Sheriff of Essex County served the summonses and complaints on October 6, 1992, to the U.S. Attorneys Office.

While a copy of the summons and of the complaint must be delivered to the U.S. Attorney in order to properly serve the United States or an officer or agency of the United States, see Fed.R.Civ.P. 4(d)(4), 4(d)(5), this court is unaware of any law which would designate the U.S. Attorney as the authorized agent for receipt of service on behalf of a federal employee sued in his individual capacity sufficient to comply with Rule 4(d)(1). Furthermore; plaintiff has produced no evidence which would support the conclusion that the individual federal employees appointed the U.S. Attorney as an authorized agent for receipt of personal service. Thus, plaintiff never effectuated proper service on the individual defendants.[1]

---

[1] It is not readily apparent from the complaint whether p., plaintiff was attempting to sue these individuals in their official or individual capacities. However, to the extent that plaintiff may have been attempting to assert an action against these individuals in their respective capacities, service was ineffective under Federal Rules of Civil Procedure 4(d)(4) and 4(d)(5). Both rules require that a copy of the summons and of the complaint be sent by registered or certified mail to the officer. Plaintiff has not made any showing that a copy of the summons and complaint was ever sent to any of the individual defendants by certified or registered mail.

Rule 4(j) of the Federal Rules of Civil Procedure provides as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within the period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed.R.Civ.P. 4(j). Plaintiff filed the instant Complaint on September 21, 1992. It is now well beyond the 120 days provided under Rule 4(j) and plaintiff has not properly served the summonses and complaint upon the individual defendants. Plaintiff was put on notice of the defendants' claim of defective service through the individual defendants' opposition to the motion to enter default. Plaintiff's reply amounted only to the contention that because OSHA did not provide plaintiff the addresses of the individuals upon plaintiff's request, plaintiff was forced to proceed through the U.S. Attorney.

"'The 120 day limit to effect service of process, established by Fed.R.Civ.P. 4(j) is to be strictly applied, and if service is not made in time and the plaintiff fails to demonstrate good cause for the delay "the court must dismiss this action as to the unserved defendant."'" Hilmon Co. (V.I.) Inc. v. Hyatt International, 899 F.2d 250, 252 (3d Cir. 1990) (quoting Lovelace v. Acme Markets, Inc., 820 F.2d 81, 84 (3d Cir.), cert. denied, 484 U.S. 965 (1987). The Hilmon court noted that "the legislative history provides only one example where an extension for good cause would be

permissible, specifically where the defendant intentionally evades service." Id.

Plaintiff has made no allegations that the defendants were evading service. Plaintiff has only claimed that OSHA would not provide plaintiff with the home addresses of defendants. Surely OSHA's refusal to provide plaintiff with the names of the names of the individual defendants does not amount to a claim that the individual defendants in any way attempted to evade service. Furthermore, plaintiff has not proffered any excuse for failing to properly serve the individual defendants which would amount to good cause. Indeed plaintiff contends that service was proper under Rule 4(d)(1) in that plaintiff delivered the summonses to the U.S. Attorney.

Plaintiff has failed to show good cause for his failure to serve the individual defendants within the time provided by Rule 4(j). Accordingly, plaintiff's motion for entry of default is DENIED and plaintiff's complaint against the individual defendants is DISMISSED WITHOUT PREJUDICE pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.[2]

SO ORDERED

/s/ Nicholas H. Politan
Nicholas H. Politan
U.S.D.J.

[2] As a result of the within disposition of the instant matter, the court will not address the individual defendants' motion for judgement on the pleadings.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

FILED
Apr 23 1993
AT8:30 1:00 PM
WILLIAM T. WALSH
CLERK

April 21, 1993

LETTER OPINION AND ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

Mr. Robert E. Mates
342 Windsor Road
Englewood, N.J.
Plaintiff Pro Se

Andrew O. Schiff, Assistant
U.S. Attorney
MICHAEL CHERTOFF, UNITED
STATES ATTORNEY
U.S. Department of Justice
970 Broad Street
Room 502
Newark, N.J. 07102
Attorneys for Defendant

Re: Robert E. Mates
v. Occupational Safety and
Health Administration, et al
Civil Action No. 92-3977 (NHP)

Dear Litigants:

This matter comes before the court on plaintiff's motion for reconsideration of my prior decision and order wherein I dismissed his complaint against defendant, the Occupational Safety and Health Administration ["OSHA"].[1] See January 25, 1993 transcript of proceedings and Order dated January 27, 1993. Plaintiff moves pursuant to Federal Rule of Civil Procedure (60)b.

Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud... misrepresentation, or other misconduct of an adverse party.....

Fed.R.Civ.P. 60(b).

---

[1] Plaintiff appears to challenge only the court's order so far as it was premised on the statute of limitations having expired. Plaintiff does not appear to seek reconsideration of the court's decision dismissing his claim against OSHA for its alleged constitutional violations.

Plaintiff does not specifically indicate on which ground he is relying in support of his motion. However, based upon a review of the entire record, the court is thoroughly satisfied that no facts exist that would warrant the granting of plaintiff's motion under any of the reasons listed in Rule 60(b). Simply stated plaintiff's cause of action is time-barred. Plaintiff has presented nothing new to the court on this motion that would support the contention that plaintiff's filing was timely or that would excuse the untimely filing of his complaint.

Accordingly, defendant's motion (should be plaintiff's motion) for reconsideration is DENIED.

SO ORDERED

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 92-3977

ROBERT E. MATES, :

Plaintiff :

V. : TRANSCRIPT OF PROCEEDINGS

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, :

Defendant,

Newark, New Jersey
January 25, 1993

B E F O R E: HONORABLE DICKINSON R. DEBEVOISE,
UNITED STATES DISTRICT JUDGE

A P E A R A N C E S:

ROBERT E. MATES, Pro se

MICHAEL CHERTOFF, UNITED STATES ATTORNEY
BY: ANDREW SCHIFF, Assistant U.S. Attorney
For the Government

Pursuant to Section 753 Title 28 United States Code, the following

transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

_____

HOWARD A. RAPPAPORT
Official Court Reporter

THE CLERK: Mates versus Occupational Safety,
MR. SCHIFF: Andrew Schiff, Assistant United States Attorney for the Occupational Safety Administration.
THE COURT: And I assume that you are Mr. Mates?
MR. MATES: I'm Robert Mates the plaintiff and representing myself.
THE COURT, Okay.
MR. SCHIFF, I'll hear you.
MR. SCHIFF: Good Morning.
We are here on OSHA's motion to dismiss Mr. Mates' complaint --
THE COURT: Not because you speak softly. We don't have microphones.
MR. SCHIFF: -- on his claim for damages for constitutional violations. Those claims are barred by sovereign immunity. The Third Circuit decision in the case of Jaffe verses United States makes it clear that the cause of action for constitutional tort created by Supreme Court in the Bivins case applies only to actions against federal employees and not to actions against the federal government.
As to his tort action, assuming that the complaint were amended to assert a claim against the United States, the claim would be barred by the statute of limitations.
Under the federal Tort Claims Act an action accrues when the plaintiff knows or should know of both the cause and

the existence of the cause of this injury.
From that date he has two years to file a claim with

the appropriate federal agency. Here the claim is filed in July 1992, which means that his cause of action is time-barred unless it accrued after July of 1990.

Mr. Mates' complaint makes it clear that his cause of action accrued prior to July of 1990. The complaint relates to negligent actions by OSHA back in 1982 and 1983. His complaint admits that he learned of the negligence when he received certain documents from OSHA in July of 1987 and that he was looking for a lawyer as early as 1989.

So that by filing a claim with the agency back in 1992, it was more than two years after the accrual of his cause and therefore his claim should be dismissed as time-barred.

THE COURT: Mr. Mates, I'll hear you.

MR. MATES: I'll try to speak up.

I'm here to represent myself. I'm not an attorney. I'll do the best I can.

THE COURT: Let me ask you a question. Let me get to one point first.

Count 2 and Count 3 of your complaint allege a violation under the Federal Constitution.

MR. MATES: My civil rights were violated because they are not enforcing the law according to OSHA.

THE COURT: Under our law, the problem that I have with Count 2 and 3, at least, is that under the case law that we have, sovereign immunity bars your bringing that kind of claim against OSHA.

Quite frankly, I could not under any circumstances sustain Count 2 and Count 3 because they are barred by the doctrine of sovereign immunity which is -- that's for sure, if I might use a colloquial expression. That's an absolute for sure. That's Count 2 and Count 3.

On Count 1 we have the statutory problem, statute of limitations, which is two years from when you -- from when the

act occurs, so to speak.

Now, as I read your papers, and as I read the government's papers, the action which -- the discharge took place in 1981. You allege in your opposing papers that there was deception, concealment and things of that nature and that you did not know about it until 1987.

MR. MATES: True.

THE COURT: Even assuming if I take, Mr. Mates, your date of 1987, the statute would run from that date and you would have to file by 1989.

How do I get around that?

MR. MATES: This is true.

However, I also asked for documents to back up my theory that they have held this against me without proper cause and they were withholding these documents and not letting me have them.

I did not get it in 1987. What I got was a highly closed document in relationship to a lot of parts that were missing. And I found a part that was missing that should not have been missing and I can prove that they edited this section without the cause.

THE COURT: Did you know at that point? The question is not when you have your complete file. That's not the issue.

The normal rule, the normal rule is two years from the event of which you complain of.

There is no question that one of the events that you complain of, or the event that you complain of, is a 1981 event. I can cite you about 10,000 cases, not off the top of my head, by just by pushing a button in a computer, which say, the statute of limitations is two years and you measure it from the time the event occurs, and the event is the discharge, albeit a wrongful discharge.

There are cases where that time is excused under state

law, federal law and common law, and it is excused if there is a fraudulent concealment of the cause of action. For example, if you have a default in a building and you sell the building and you don't tell about it, or the doctor who leaves a sponge in a body and doesn't tell the patient, by the way I left a sponge in your body, and the patient finds out about it two or three years later, the time runs from then. Or if the doctor conceals.

There is all sorts of different kinds of ways that you can extend the statute. But that extension does not go to the extent of permitting the cause of action to lay open just because all the proofs are not in.

Mr. Mates: But in 1981 I did not have a case against OSHA. They were supposed to defend me. My case was against my prior employer who discharged me illegally, and he violated the OSHA law in doing so.

They in turn did not enforce the OSHA law on a minor technicality, again time-barred. They said that I filed 13 days beyond the 30-day limit.

However, the 30-day limit states that an employee who has been violated against after his discharge may file within 30 days, and I was discharged on December 31, 1981. I filed on October 13, 1981, which is many, many days ahead of that.

They refused to acknowledge this fact. They continuously fought me. I wrote to Congressmen, I got my appeal through him twice, and a third time --

THE COURT: You could have sued them right then and there.

MR.MATES: I didn't have the money. I was out of employment. I could not find work. I was getting blacklisted. They said no, they could not find proof.

I discovered the proof. It's right there in the papers they sent me. I was being talked about improperly and things

were being said about me that were not true by people I never even met, which meant that it was within collusion, within themselves, they were all discussing this and giving this person who I never met the information.

Of course, I continued to try to fight my case with them to get them to reopen it and they would not do so.

Finally I decided that I have to have more information. I had to discover why they did this. Who was responsible? Somebody on top?

I could not get it. They barred this information from me. They would not allow me it, no discovery. I cannot act without this. How can I present a case with no discovery? I asked them again for it and they refused to give me these papers.

Now I'm asking you, and I'm putting it in, I'm adding a motion to you requesting discovery and find out from their papers what's in their papers what they did to me.

Of course, there is a law in 1935 in New Jersey that says time barring by plaintiff -- by defendant who is guilty of fraudulent withholding of documents is not permitted.

How can they do one and still gain the other?

THE COURT: All right, I'm prepared to rule. You can sit down now.

The complaint in this action was filed on September 21, 1992 seeking compensatory and punitive damages against the defendant, the Occupational Safety and Health Administration and several former and present employees in the United States Department of Labor.

It would appear from the papers to be uncontradicted that in 1981 the plaintiff filed a complaint with OSHA alleging his employer had forced him out of his job and caused him to resign of get fired as a result of a safety complaint being filed against the employer, the museum, with OSHA.

Plaintiff alleges the actions of the people in OSHA were such that they lied to him, that they didn't tell him of the proper facts, didn't keep him informed as to the investigation, and generally did not do a job, either negligently or intentionally.

His case was closed by OSHA in 1982. He filed an appeal which was dismissed in January 1983 and a second appeal was dismissed in July of 1983.

As I said, it is the contention of the plaintiff in Count 1 of the complaint that either negligently or intentionally OSHA or its employees deprived him of his rights.

I'm satisfied that the complaint, first of all, does not properly allege the proper defendant under the federal Tort Claims Act. It cannot be OSHA. It must be the United States. Insofar as that aspect of the matter is concerned, I will dismiss the tort claim against OSHA as being the improper party.

I will dismiss it further for the reason that the action against the United States, where the United States to be defendant here, is time-barred.

The statute is a two-year statute. There is no question that the actions of discharge occurred in 1981. There is no question that complaints were filed in OSHA in 1982 and ultimately dismissed in 1982 and 1983.

I will not toll the statute in this instance because there are no facts before me to indicate that tolling is a proper procedure in this case.

It's clear that everything that accrued occurred long, long ago, and even assuming that matters ultimately came to the attention of the plaintiff in 1987 which in his mind established a cause of action, and I am not ruling that the time actually started in "87, but I'm saying giving the plaintiff the best of the situation, it started in June of '87, it still would be time-barred. The time bar is definitely a defense to that cause

of action.

Insofar as Count 2 and 3 of the complaint are concerned, which assert a claim based upon violation of rights under the Fifth Amendment, I'm satisfied those claims are barred under the doctrine of sovereign immunity and the Third Circuit case of Jaffe versus United States, 592 Federal 2d 712, Third Circuit, 1978, cert. denied, 441 U.S. 961, 1979.

Mr. Mates, while I do have concern for you and do sympathize with you in terms of what may be a wrong here-- and I'm not suggesting that there is proof before me that there is or is not a wrong, but in your assertion of your right I certainly sympathize with you, and I do sympathize with you the fact that you couldn't have a lawyer when you wanted to have a lawyer and all of the other problems.

I'm compelled to apply the law as it exists without regard to those personal feelings.

Mr. Mates: Your Honor, you keep saying that because I'm representing myself?

THE COURT: No.

MR. MATES: And you're not going to acknowledge my case?

THE COURT: No, no. I'm saying at one point you say in your papers you couldn't get a lawyer for a couple of years when you were trying to get a lawyer.

I sympathize with you in that respect.

MR. MATES: I did find a lawyer in 1981 who wrote to the Occupational Safety and Health Administration in Washington, and they did not acknowledge his request for discovery, did not answer his calls. They have been totally barring me all the time.

THE COURT: I understand that.

MR. MATES: I feel that there is something in there, that they are withholding something, why don't they give it to

me unless they are hiding something?

THE COURT: I honestly don't know.

Mr. Mates: They are hiding the cause that they are guilty for what they have done against me. They failed to uphold the occupational safety and health laws.

THE COURT: I understand you feel aggrieved, Mr. Mates. I have no problem with that. I understand and sympathize with you in that regard.

My hands are tied.

MR. MATES: They were representing me for years. They were wrong in closing my case. They violated the occupational safety and health laws themselves.

THE COURT: But I am bound, Mr. Mates, I am bound by the laws as they exist.

Mr. Schiff, I would ask you to please submit an order in that regard.

Thank you very much.

Anything further that I have to do?

APPENDIX I

MICHAEL CHERTOFF
United States Attorney
970 Broad Street, Room 502
Newark, New Jersey 07102
(201) 645-2835
AOS-3419

FILED
JAN 27 1993
AT8:30.....M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT E. MATES : **Hon Nicholas H> Politan**

Plaintiff : Civil Action No> 92-3977

V. :

OCCUPATIONAL SAFETY AND: HEALTH ADMINISTRATION, et :

Defendants.

ENTERED
on THE DOCKET
on 1-28 1993
WILLIAM T. WALSH
CLERK
by /s/_____
(Deputy Clerk)

THIS MATTER having been opened to the court by Michael Chertoff, United States Attorney for the District of New Jersey, on behalf of the defendant Occupational Safety and Health Administration ("OSHA"), and upon consideration of OSHA's motion to dismiss, its brief in support thereof, and plaintiff's response thereto, and for good cause appearing,

IT IS on this 27th day of January, 1993

ORDERED that

1. OSHA's motion is granted; and

2. Plaintiff's complaint is DISMISSED WITH PREJUDICE as against OSHA.

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN, U.S.D.J.

ACKNOWLEDGEMENT

STATE OF NEW JERSEY)
)
COUNTY OF BERGEN)

The foregoing instrument was acknowledged before me on the 16th day of JAN., 1996, by Robert E. Mates, Pro se.

/s/ Eustacia Black
Notary Public
EUSTACIA BLACK
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 10, 1997

My Commission Expires:

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Robert E. Mates, Attorney
Pro se, Plaintiff

v.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: 92-3977 NHP

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MATTHEW A. GILMARTIN, Regional Supervisor Investigator; ARTHUR M. JOHANNES, Acting Supervisory Investigator; THORNE G. AUCHTER, Former Assistant Secretary; JOHN B. MILES, JR., Director of Field Operations; GEORGE SALEM, Solicitor of Labor; SETH D> ZINMAN, Associate Solicitor for Legislation and Legal Counsel; JOHN A. PENDERGRASS, Former Assistant Secretary; PATRICK R. TYSON, Former Acting Assistant Secretary; GERALD P. REIDY,JR., Regional Administrator.

TO:(Name and Address of Defendant)
Mr. Matthew A. Gilmartin, Regional Supervisor Investigator
c/o Mr. Michael Chertoff, United States Attorney
970 Broad Street, Newark, N.J. 07102

YOUR ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (Name and address)

Robert E. Mates, Attorney Pro se 342 Windsor Road, Englewood, N.J. 07631

an answer to their complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

WILLIAM T. WALSH — **SEP 22 1992**
CLERK WILLIAM T. WALSH — **DATE**

/s/ AURORA A. BELL
BY DEPUTY CLERK